84-1249 (1)
Docket No.

Office-Supreme Court, U.S.
FILED
FEB 4 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1984

GEORGE C. NORRIS, SR.,
and
BARRY SILVER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the indictment in the instant case was defective and failed to charge an offense against the United States in that Title 12 U.S.C. §1715z-4(b)(2) does not apply to mortgages which have been paid by and assigned to HUD and are therefore no longer insured mortgages.

2. Whether Title 12 U.S.C. §1715z-4(b)(2) is unconstitutional in that it is so vague and its applicability is so debatable and uncertain that the defendants could not have formed the requisite intent to violate such code section as alleged in the indictment.

3. Whether Title 12 U.S.C. §1715z-4(b)(2) is unconstitutional in that it constitutes an impermissable delegation of legislative authority.

4. Whether the defendants were denied due process of law where there was no evidence presented at trial which would

support a finding that the defendant Norris made false material statements or that the defendants conspired to make false material statements.

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The Petitioners, George C. Norris, Sr. and Barry Silver, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming their respective convictions entered in the United States District Court for the Eastern District of Virginia, Norfolk, Division, on the 7th day of November,

1983. George C. Norris, Sr. was convicted of one count of conspiracy to violate Title 12 U.S.C. §1715z-4(b)(2); one count of violation of Title 18 U.S.C. §1001 & 2; and fifteen counts of violations of Title 12 U.S.C. §1715z-4(b)(2). Barry Silver was convicted of one count of conspiracy to violate Title 12 U.S.C. §1715z-4(b)(2); and five counts of violation of Title 12 U.S.C. §1715z4(b)(2).

The Petitioners, George C. Norris, Sr. and Barry Silver, are hereinafter referred to as "defendants" or "Norris" and "Silver" respectively. Page numbers set out herein refer to pages in the Transcript of the proceedings.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit was filed on December 5, 1984. The Opinion of the Court of Appeals is reported at ____ F.2d ____, (Record No. 83-5277L and

No. 83-5278) and is printed in the Appendix of this Petition (App. 1a-26a). The Memorandum and Opinion of the Trial Court affirming the jury verdict of conviction as to both Norris and Silver is unpublished but is printed in the Appendix hereto. (App. 27a-57a).

JURISDICTION

The jurisdiction of this Court is envoked under 28 U.S.C. §1254(1). The jurisdiction of the Trial Court was envoked pursuant to 18 U.S.C. §2331.

STATUTES INVOLVED

Title 12 U.S.C. §1715z-4(b)(2) is reprinted in the Appendix hereto (App. 58a-61a).

STATEMENT OF THE CASE

Nature of the Case and Proceedings Below

George C. Norris, Sr. was charged in Criminal Indictment No. 83-88-N filed on May 9, 1983 in the United States

District Court for the Eastern District of Virginia, Norfolk Division, with conspiracy to violate 12 U.S.C. §1715z-4(a) and (b), equity skimming, and 18 U.S.C. §1001 and 2, making false material statements; he was also charged with nineteen violations of 12 U.S.C. §1715z-4(a) and (b), equity skimming.

Barry Silver was also charged in Criminal Indictment No. 83-88-N filed on May 9, 1983 with conspiracy to violate 12 U.S.C. §1715z-4(a) and (b), equity skimming, and 18 U.S.C. §1001 and 2, making false material statements; he was also charged with five violations of 12 U.S.C. §1715z-4(a) and (b), equity skimming.

All of these charges arose out of allegations by the United States that Norris and Silver had unlawfully conspired to use, and had used, rents or funds derived from the operation of a

housing project which had a federally insured mortgage, for purposes other than required for the actual and necessary operation of the project, without the consent of the Secretary of HUD.

Norris and Silver filed pre-trial motions to dismiss the indictment alleging that the statute was unconstitutional, and that the indictment failed to properly charge an offense. These motions were based in part upon the defendants' contention that the subject mortgage which had been acquired and assigned by HUD was no longer an insured mortgage, and accordingly 12 U.S.C. §1715z-4(a) & (b) was not applicable.

On July 19, 1983, the Court following a hearing on the motions, overruled all defendants' motions with the exception of the Motion to Dismiss for Failure to Properly Charge an Offense which was taken under advisement.

The United States Government, realizing that the mortgage was no longer an insured mortgage once it had been paid and assigned to HUD, therefore filed a superseding Indictment (App. 62a-84a) on July 25, 1983 prior to the Court's ruling on the Motions to Dismiss for Failure to Properly Charge an Offense. The superseding Indictment charged Norris with conspiracy to violate 12 U.S.C. §1715z-4(b)(2), and 18 U.S.C. §1001 and 2; one violation of 18 U.S.C. §1001 and 2; and fifteen violations of 12 U.S.C. §1715z-4(b)(2).

Silver was charged in the same superseding Indictment with conspiracy to violate 12 U.S.C. §1715z-4(b)(2), and 18 U.S.C. §1001 and 2; and five violations of 12 U.S.C. §1715z-4 (b)(2).

The matters came on for trial by a jury on September 29, 1983. At the conclusion of the Government's evidence, Norris and Silver moved for a Judgment of

Acquittal which motion was denied by the Court. On October 5, 1983, defendants concluded the presentation of their evidence and renewed their motions for judgment of acquittal which were overruled. On October 7, 1983, the Jury returned a verdict finding defendants guilty as charged on all counts.

Norris and Silver filed post-trial motions for a new trial, a judgment of acquittal and an arrest of judgment which motions were overruled by the Court in a written Memorandum Opinion on November 4, 1983. (App. 27a-57a).

On November 7, 1983, the Court sentenced Norris as follows: On Count 1, the conspiracy count, and Count 2, making false material statements, Norris was sentenced to two years confinement as to each Count with 70 days to serve as to each Count; on Counts 3-17, equity skimming, he was sentenced to one year confine-

ment as to each Count with 70 days to serve as to each Count; all periods of confinement to run consecutively with 3 years probation commencing upon release from confinement. The Court sentenced Silver as follows: On Counts 1, 8, 10, 13, 14 and 15, one year confinement as to each count with 60 days to serve as to each Count; all period of confinement to run consecutively with three years probation commencing upon release of confinement.

On November 7, 1983, a Judgment and Commitment Order was entered by the Court and defendants filed their Notice of Appeal.

STATEMENT OF FACTS

George C. Norris, Sr., opened a real estate office in 1960 under the name of George C. Norris and Associates. Sometime thereafter he formed Norris Realty Company, a sole proprietorship. In 1974

he and Thomas Fennell, a prominent attorney in the City of Portsmouth, Virginia, started Shamrock Gardens, a 74 unit apartment complex in Chesapeake, Virginia.

Fennell, a highly reputable attorney in the City of Portsmouth specialized in corporate, real estate matters and "syndications of projects" (Tr. 523). (At the time of the trial Mr. Fennell had died).

Fennell and Norris were general partners in Shamrock Gardens and had 19 limited partners. They also had several other federally insured apartment projects. Norris Realty Company was the managing agent for all of the projects.

The financing for the project was federally insured by the Department of Housing and Urban development, ("HUD"), through the Federal National Mortgage Association, ("FANNY MAY"). Shamrock Gardens, as all federally insured projects,

was governed by a "regulatory agreement" in this instance dated July 17, 1973. The federal loan on Shamrock Gardens, secured by deed of trust, was $1,353,200.00 with principal and interest payments of $8,409.21 per month.

There came a time when Shamrock Gardens went into default in the payment of the monthly mortgage payments. FANNY MAY, then had the right to assign the mortgage at whatever balance existed at that time back to the Secretary of HUD because of the HUD guarantee of the loan. HUD paid the outstanding balance to FANNY MAY and the mortgage then became a "HUD held" mortgage (Tr. 58). As long as FANNY MAY had held the mortgage it was "an insured loan" (Tr. 58) but once the mortgage was taken over by HUD, and was assigned back to HUD by the Federal National Mortgage Association, "it was no longer an

insured loan" (Tr. 55, 132, 139).

Norris testified that the reason for the default was because of "cost overruns" of approximately $198,000.00 incurred during construction. Shamrock requested HUD to increase the mortgage by that amount plus the accrued interest but were denied the increase. While HUD, of course, could have foreclosed after the mortgage was assigned to the Secretary, it was their general policy, and their desire in this instance to attempt to work out a reinstatement of the mortgage. To that end, HUD representatives met with Norris and his controller, Silver, in December, 1976. Over the next 2 years or so, efforts continued on both sides to attempt to effect a mutually satisfactory "workout agreement". In April 1978, Norris and Silver met with Fred W. Pfaender, who was then Director of Loan Management at HUD headquarters in Washington.

The purpose of the meeting was that the project was "in serious default" and Pfaender, who had been considering foreclosing, wanted to explore "the prospects for reinstatement" (Tr. 119).

A tentative or proposed workout understanding was reached; but no agreement was signed or executed (Tr. 124). The provisional workout arrangements were, however, reduced to writing, signed by Pfaender on behalf of HUD, and sent down to the owners of Shamrock for their execution, but were never executed. The provisional workout agreement required payment of $50,000.00 "front money" to be put up immediately and $5,000.00 a month to be paid by the general partners in addition to the regular monthly payments.

Norris and Fennell were unable to raise the $50,000.00, so Norris returned the proposed workout agreement to HUD

(Tr. 835) with an accompanying letter telling HUD that he realized that the proposed agreement was "ineffective" unless and until he was to send the $50,000.00 together with a signed agreement that the partners would be responsible and would pay $5,000.00 a month in addition to the regular mortgage payments (Tr. 131).

The projects were required by HUD to file monthly statements of their financial condition, and while statements were not filed timely for each month they did use their best efforts to do so. Eventually they were all brought up to date and filed (Tr. 580).

Both Norris and Silver testified that they had problems with their accounting system which contributed to the delay of the filing of monthly reports, that they switched over to a computer system in the office and in 1974 hired a

certified public accounting firm to review their records and prepare financial statements for the project each year (Tr. 689). Norris testified that he had undertaken to keep the best set of books he could so that there would be no problems with either HUD or the Internal Revenue Service (tr. 808).

Both Norris and Silver denied that there was ever any conspiracy or agreement between them to violate the law (tr. 658; 832).

With regard to the substantive counts of equity skimming, Norris testified that from time to time there were transactions between the different entities (Tr. 811) however, at all times it was his intention to record each and every transaction in the books and records correctly and to show exactly "what they went for" (Tr. 811).

Both Norris and Silver testified that the disbursements that were made from Shamrock, which were the subject of the substantive counts of the indictment, were either payments made to other insured projects they were involved with, or in some instances were loans to Norris himself, but in every instance the precise, exact and correct nature of the transaction was fully recorded in the books. Not only did the independent accountants know that this was being done, and had been done ever since Shamrock's inception (Tr. 820) but HUD also knew about "all of these disbursements" (Tr. 821). Norris testified, and it was not denied, that on his many trips to Richmond to the HUD office they would "spend the day" talking about those disbursements (Tr. 821).

Government witness, John M. Taylor, employed by HUD as a loan specialist, testified that his "section" was aware of

distributions from Shamrock Gardens for other than actual and necessary operating expenses after a meeting in December, 1976 (Tr. 47, 48). Taylor also was aware from the monthly reports from May to December 1976 that disbursements and expenditures were being made for other than necessary operating expenses (Tr. 79, 80) and from reports that were filed thereafter it was apparent to HUD that disbursements were being made. Taylor further testified that this was "an ongoing question being discussed with Mr. Norris" and that there were $63,000.00 in disbursements, known to HUD, that had not gone for necessary operating expenses (Tr. 83).

Thus, HUD knew of each and every expense from Norris' books and records that were kept in the ordinary course of his business; and from the monthly reports and annual financial statements that were being filed with HUD. Nevertheless,

during the years of discussions in an effort to reach a mutually satisfactory workout agreement, no HUD representative or official ever advise Norris or Silver that the disbursements were illegal and constituted a violation of law (Tr. 84, 107). On the contrary, the discussions centered around the fact that the disbursements were "improper" under the terms of the Regulatory Agreement (Tr. 111, 97) for which the Secretary has "civil remedies" (Tr. 68). The Regulatory Agreement, exhibit 1-B, states in section 6(b):

> "Owner shall not without the prior written approval of the Secretary:
>
> (b) assign, transfer, dispose of or encumber any personal property of the project, including rents, or pay out any funds except from surplus cash, except for reasonable operating expenses and necessary repairs" (Tr. 68).

Both Norris and Silver testified that they did not know that the disbursements they were making were a violation

of any criminal law and that they had no intention to do anything criminally wrong or illegal.

The Shamrock Gardens financial statement received by HUD on April 9, 1979 was the subject of count two of the indictment, to-wit, that a false statement was made by Norris to HUD in violation of 18 U.S.C. §1001-1002.

That statement showed that the total project expenses for that year were $297,104.00. That was further broken down in attached schedules, one of which was $35,584.00 for maintenance expenses. The $35,584.00 was further broken down into items including "decorating supplies" of $5,107.00 (Tr. 688) that figure included $650.00 expended for carpet that was not used in the Shamrock Gardens project which is the only falsity, in the 14 page financial statement, charged by the government (Tr. 689).

Norris testified that in one instance he wanted some "different color carpet" which he purchased from Accent Ltd., who billed it to him and he paid for it with two checks in the amount of $300.00 and $350.00, respectively, from the Shamrock account (Tr. 870). However, immediately upon his return to the office from the carpet merchant he instructed his carpet installer to "draw down an equal amount of carpet" from Norris' warehouse on Airline Boulevard and put it in Shamrock at no charge, which he did (Tr. 870).

Moreover, at the time the financial statement was made and filed with HUD, Norris was no longer the managing General Partner of Shamrock Gardens and he neither signed nor filed the statement with HUD (Tr. 885). Tom Fennell signed the financial statement (Tr. 885) and he signed the cover letter to HUD's Deputy

Director of management in Richmond in filing the statement with HUD (Tr. 885, 884). At that time Fennell was the managing General Partner (Tr. 886).

Norris stepped down as acting general manager in April 1979. The project, Shamrock Gardens, has corrected the mortgage default; has entered into a workout agreement with HUD and continues to exist with HUD holding the mortgage.

ARGUMENT

I. THE INDICTMENT IN THE INSTANT CASE WAS DEFECTIVE AND FAILED TO CHARGE AN OFFENSE AGAINST THE UNITED STATES IN THAT TITLE 12 U.S.C. §1715z-4(b)(2) DOES NOT APPLY TO MORTGAGES WHICH HAVE BEEN PAID BY AND ASSIGNED TO HUD AND ARE THEREFORE NO LONGER INSURED MORTGAGES.

Defendants were charged in the Indictment with the violation of Section 239 of the Housing and Urban Development Act of 1968 codified as 12 U.S.C. §1715z-4 entitled "Modifications in Terms of Insured Mortgages Covering Multi-Family Projects" (App. 58a) (Emphasis Added). The government charged that the defendants conspired to use and did use rents and other funds derived from the Shamrock Gardens Project for purposes other than to meet actual and necessary expenses while the mortgage was in default in violation of §1715z-4(b)(2).

Originally the Shamrock Gardens mortgage was held by a lending institution and the loan was insured by HUD. After the mortgage went into default, HUD paid the insurance proceeds and, the mortgage was assigned to the Secretary of Housing and Urban Development, and the lending institution was no longer a party

to the transaction. Thereafter, the mortgage became a HUD-held mortgage and was no longer insured. The government concedes that at all times pertinent to the Indictment, the mortgage on the Shamrock Gardens Project was not an insured mortgage.

It is the contention of the defendants that 12 U.S.C. §1715z-4 applies to insured mortgages only and since the Shamrock Gardens mortgage was not an insured mortgage, the indictment was defective and failed to charge an offense against the United States.

In addition to the title of the statute, an examination of its language serves to point up that it applies only to insured mortgages. The statute is divided into two paragraphs. Paragraph (a) explains the provisions under which the Secretary can grant extensions or modifications of insured mortgages. Para-

graph (b) provides for the violations and penalties and states in part that whoever "willfully and knowingly uses or authorizes the use, while such mortgage is in default . . . ." The language "such mortgage" unquestionably refers to the insured mortgages described in paragraphs (a).

An examination of the legislative history of this statute is instructive and reveals that it was designed to apply to insured mortgages only. Congress recognized that while HUD was the insurer of a mortgage and not an actual party to the transaction between the mortgagor and the mortgagee that HUD had very little, if any, control over the disbursements of project funds. It was apparent that some mortgagors who saw their project going into default would divert the funds to their own use and thereafter recoup any losses from the insurance proceeds.

House Report No. 1585, 90th Cong.,

2d Sess., reprinted in 1968 U.S.Code Cong. and Ad. News 2873, 2906, 2995, outlined the purpose of the statute and provided in part:

> Section 302 of the bill would add a new section 239 to the National Housing Act to require that any request for the extension of time for curing a default on an FHA-insured multifamily mortgage, or a modification of the terms of such a mortgage, be approved by the Secretary of HUD in accordance with regulations prescribed by him. During the period of modification or extension any rents or other funds (such as security deposits) derived from the mortgaged property in excess of that needed to meet operating expenses would be required to be held in trust by the mortgagor and distributed only with the consent of the Secretary.
>
> This section is designed to discourage distribution of rental income of multifamily projects to stockholders of a mortgagor, corporation or individual owners where such income should be used to meet mortgage payments. Where it is thought that a mortgage property probably will not generate enough income to meet mortgage payments, there is a temptation for the owners to divert funds received from rentals to their own use and to allow the mortgage to go into default

in order to recoup their investment in the project and even to show a profit in the investment.

Civil actions have generally proven inadequate as a means of discouraging such actions or of recovering all diverted funds. Section 239 would provide criminal penalties for such willful diversion of funds by a mortgagor or a stockholder, director, officer, or agent of the mortgagor during the period in which the time for curing a default has been extended or the terms of the mortgage modified. The maximum penalty would be a fine of not more than $5,000 or imprisonment of not more than 3 years, or both.

Congress was obviously faced with a situation where a mortgagor would become in default and request from the lending institution an extension of time to cure the default. During this time, the lending institution was secure in the knowledge that the loan was insured by HUD. If during the period of extension, the mortgagor were to divert project funds, the lending institution would not sustain a loss. The Secretary was a

third party to this transaction and had no control over the granting of the extension or the diversion of funds as HUD stood in the position of an insurer only. The purpose of the new statute was to require that the Secretary approve any extension of time to cure a default or a modification of the mortgage terms and that during the period of modification or extension, any diversion of project funds would be subject to criminal penalty.

The new statute added the protection that HUD needed as the insurer of FHA multifamily mortgages. Once the mortgage has been assigned to HUD, the Secretary no longer holds the position of a third party in the transaction. As the holder of the mortgage, the Secretary can control directly any default by the mortgagor and if necessary, foreclose on the mortgage. As the holder of the mortgage, the Secretary stands in the position of any

other mortgagee in similar business transactions and there is no necessity for criminal penalties. Indeed, in the business world today, there are no criminal penalties for the failure of a mortgagor who is in default to apply the income from his investment property to the payment of his mortgage.

It is and has been the expressed position of the Department of Housing and Urban Development that 12 U.S.C. §1715z-4 does not apply to mortgages that are not insured and which have been assigned to the Secretary.

Jane McGraw, General Counsel to HUD, published an Opinion dated June 10, 1980, on this issue in what has come to be known as the "Taino Towers" case. In that case, the mortgage had gone into default, the insurance was paid and the mortgage was assigned to the Secretary exactly as in the case of Shamrock Gardens.

The question was whether or not §1715z-4 was applicable to a mortgage which was not insured, and in her Opinion to the Assistant Secretary for Housing, HUD's General Counsel stated as follows:

> "We conclude that Section 239 does not provide independent authority for the Secretary to modify mortgage terms, but merely imposes restrictions on the use of surplus project income when the Secretary consents to such modifications.
>
> Moreover, we conclude that the statutory restrictions on the use of surplus income imposed by Section 239, while prudent in cases where the Secretary has been assigned a mortgage, were intended as a requirement only in cases where the Secretary is not the mortgagee. The use of the term "consent" in the statute and "approval" in the Congressional reports indicate that the agreement for an extension or modification involves the Secretary only as a third party interested in a transaction between a separate mortgagee and the mortgagor. The underscored language in the regulations quoted above indicates that this is the interpretation of the Department.

On December 4, 1969, John W. Kopecky, Acting Associate General Counsel for HUD,

wrote to William D. Ruckelshaus, Assistant Attorney General in response to a request for an Opinion as to the applicability of the statute to mortgages that had been assigned to the Secretary (App. 108a). In this Opinion, the General Counsel states as follows:

> "In our opinion, the legislative history and the language of Section 239 limit its applicability to mortgages insured by the Secretary, as distinguished from mortgages owned and held by the Secretary by reason of assignment from the original mortgages in exchange for insurance benefits. The term 'insured mortgage' is used in the legislative history and in the title of the Section as it appears in the Housing and Urban Development Act. Moreover, the phrase 'regulations of the Secretary,' which appeared in Section 239(a), refers to the FHA Regulations which apply only to insured mortgages. Accordingly, there can be no violation of Section 239 after an insured mortgage has been assigned to the Secretary. [Emphasis added].

Defendants respectfully submit that certiorari should be granted. Rule 17 of the Rules of the United States Supreme Court states that one of the considerations

governing review on certiorari is where a Federal Court of Appeals has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter. In affirming the District Court's decision, the Fourth Circuit held on the appeal of this case that "the language of Title 12 U.S.C. §1715z-4(b)(2) clearly indicates that it is applicable to mortgages that are not insured or no longer insured." (App. 11a). While this appeal was pending before the Fourth Circuit, the United States District Court for the District of Delaware on the identical set of facts held that Title 12 U.S.C. §1715z-4(b)(2) was not applicable to mortgages which are not insured. U.S. v. Capano, Crim. Action No. 84-38-WKS (App. 85a). Capano is currently on appeal to the Third Circuit Court of Appeals awaiting oral argument. Although at the present time, we do not have a conflict between

Circuit Courts, defendants cannot wait for such a conflict to arise given the time limitations for filing a petition for certiorari. Nevertheless, certiorari has been granted where, as in the instant case, one Circuit Court of Appeals had decided the question in direct conflict with other District Court opinions. U.S. v. Constantine, 296 U.S. 287 (1935). In Constantine this Court stated that because there were District Court opinions in conflict with the Fifth Circuit Court of Appeals and because there were many other pending actions involving numerous persons, that the issue raised special and important questions which justified the granting of certiorari. Defendants urge that this case presents more than intellectually interesting problems and raises "special and important questions" which are important to the public as distinguished from the parties. It is estimated that

there are in excess of 2,000 federally insured loans currently in default throughout the nation. Numerous persons and tremendous amounts of federal funds are involved. Certioraari was granted in U.S. v. An Article of Drug . . . Bacto-Unidisk, 394 U.S. 784 (1969) because the interpretation of the Act raised issues of importance in the administration of the Federal, Food Drug and Cosmetic Act.

Defendants respectfully submit that certiorari should be granted in this case because of the conflict in the decisions, the numerous people and amounts involved, and because the interpretation of the Act raises issues of importance in the administration of the National Housing Act.

II. TITLE 12 U.S.C. §1715z-4(b)(2) IS UNCONSTITUTIONAL IN THAT IT IS SO VAGUE AND ITS APPLICABILITY

IS SO DEBATABLE AND UNCERTAIN THAT THE DEFENDANTS COULD NOT HAVE FORMED THE REQUISITE INTENT TO VIOLATE SUCH CODE SECTION AS ALLEGED IN THE INDICTMENT.

It is well settled that where the statute in question is so vague and its applicability so debatable and uncertain that a defendant cannot, as a matter of law, form the requisite intent to violate it. James v. U.S., 366 U.S. 213 (1961).

In United States v. Critzer, 498 F.2d 1160, (4th Cir. 1974), the Court considered the criminal conviction of a defendant for willfully attempting to evade and defeat federal income taxes with respect to income earned from improvements located on land in which defendant had a possessory holding. In Critzer, there was indecision among various government agencies as to whether the subject income was taxable.

The Bureau of Indian Affairs found that the income was not taxable. The Department of Interior, for legal and policy reasons, believed that the possessory holdings were tax exempt. However, the Justice Department disagreed and criminal charges were instituted. After conviction and appeal, the Court stated:

> "It is settled that when the law is vague or highly debatable, a defendant - actually or imputedly - lacks the requisite intent to violate it." Critzer, supra, 498 F.2d at 1162.

The Court further held:

> "As a matter of law, a defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no

> certainty as to what the law required." Critzer, supra, 498 F.2d 1162.

The instant case presents an identical situation. The Justice Department and HUD have reached directly opposing conclusions in their consideration of whether 12 U.S.C. §1715z-4 applies to situations where the Secretary of HUD is the mortgagee/owner of the mortgage. In the published Opinion of Jane McGrew, General Counsel to the Department of Housing and Urban Development, in the "Taino Towers" case referred to above, it was specifically stated by the General Counsel that:

> ". . .the statutory restrictions on the use of surplus income imposed by Section 239 [12 U.S.C. §1715z-4] while prudent in cases where the Secretary has been assigned a mortgage, were intended as a requirement only in cases where the Secretary is not the mortgagee." (Emphasis added)

Further, in the letter of December 4, 1969 from Kopecky, Acting Associate General Counsel for HUD, to Ruckelshaus,

Assistant Attorney General, the Acting Associate General Counsel advised the Attorney General that in HUD's opinion:

> "the legislative history and the language of §239 [12 U.S.C. §1715z-4] limit is applicability to mortgages insured by the Secretary, as distinquished from mortgages owned and held by the Secretary by reason of assignment from the original mortgagee in exchange for insurance benefits. . . . Accordingly, there can be no violation of Section 239 [12 U.S.C. §1715z-4] after an insured mortgage has been assigned to the Secretary." (App. 108a-109a).

Mr. Kopecky went on to state that HUD agreed:

> "that the legislative history indicates that the criminal penalty under Section 239(b) [12 U.S.C. §1715z-4(b)] applys only to willful diversions during the period in which the time for curing the default has been extended or the mortgage is under modification." (App. 109a-110a).

While he acknowledged that the clause contained in Section 239(b)(2) [12 U.S.C. §1715z-4(b)(2)] "or is not otherwise covered by such regulation" might be construed to cover any diversion on a

project mortgage after default, it is apparent that you have to strain to arrive at such a construction. Title 12 U.S.C. §1715z-4(b)(2) is a criminal statute and must be strictly construed. Where a defendant's freedom is at stake, a criminal statue is not entitled to the benefit of straining or a liberal interpretation in order to bring the defendant's conduct within the proscription of the statute. For HUD to state that the statute "might be construed" to cover a diversion of funds on a project mortgage after default is clearly an indication of the vagueness, and accordingly the unconstitutionality and invalidity of the statute.

In any event, it is apparent that there is a diversion of opinion between the Justice Department and HUD as to the applicability of the statute, and accordingly the statute is so vague or debatable that the defendant cannot be held to have

willfully and intentionally violated the statute. As the Court stated in Critzer, supra, even if Norris and Silver had consulted the law and the opinions of HUD's general counsel, they could not have had any certainty as to what the law required.

In Capano, supra, the District Court in Delaware came to the same conclusion. In the opinion the Court stated:

> I conclude that this Court should defer to the Secretary's interpretation not only because he is the official responsible for the administration of the program and because his construction is supported by the legislative history, but also because this is a criminal case and the defendant should not be held accountable for arriving at a construction of the statute contrary to that inherent in the implementing regulations.
>
> The defendant's motion must be granted for a further, independent reason, however. As evidenced by the text of the statute and the above-quoted legislative history, Section 1715z-4 is concerned with the conditions under which the Secretary will consent to an extension or modification and with the protection which the

> government will have during the term of the extension or modification while there is an attempt to cure the default. While portions of subsection (b) can be read in isolation to apply in situations [apparently like the instant one] where there has been no extension or modification, that is a strained reading in the context of the section as a whole and its apparent purpose. In the absence of an administrative regulation giving notice of such an interpretation, I decline to apply it in a criminal case. (Emphasis added). (App. 94a-95a).

III. TITLE 12 U.S.C. §1715z-4(b)(2) IS UNCONSTITUTIONAL IN THAT IT CONSTITUTES AN IMPERMISSABLE DELEGATION OF LEGISLATIVE AUTHORITY.

Section 239 of the Housing Act is unconstitutional in that it constitutes an impermissible delegation and abdication of legislative authority. On its face the statute provides that "whoever . . . in violation of a reguation prescribed by the Secretary . . ." shall be punished, etc. Obviously, Congress intended to pass

a criminal statute but left the decision as to what acts should constitute criminal conduct up to the Secretary of HUD. The Secretary, therefore, has the authority pursuant to this statute, to pass such regulations as in his sole discretion he may deem expedient and the violation of such regulations would thereafter be a criminal act.

It is well-settled that the delegation by Congress of its essential legislative function is precluded by the provisions of the Federal Constitution, Article 1, Section 1. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). The legislature cannot delegate the power to make laws to any other authority or body. United States v. Shreveport Grain and Elevator Company, 287 U.S. 77 (1932).

When Section 239 of the Housing Act was passed the then Secretary of Housing and Urban Develpoment, Robert C. Weaver,

wrote the Chairman on the Committee on Banking and Currency outlining, at the committee's request, the Department's views on the bill. His letter of July 21, 1967 (App. 98a) contains the following language:

> "The Department supports the objective of providing a criminal statute as a deterrent to the diversion of rental income from multifamily projects. We would defer, however, to the Department of Justice as to the constitutionality of criminal provisions such are contained in Section 1 of the bill which leave the definition of the crime to the exercise of broad administrative discretion in the issuance of regulations."

It is, therefore, respectively, submitted by the defendants that Section 239 of the Housing Act upon which this Indictment is founded is unconstitutional.

IV. THE DEFENDANTS WERE DENIED DUE PROCESS OF LAW WHERE THERE WAS NO EVIDENCE PRESENTED AT TRIAL WHICH WOULD SUPPORT A FINDING

THAT THE DEFENDANT NORRIS MADE FALSE MATERIAL STATEMENTS OR THAT THE DEFENDANTS CONSPIRED TO MAKE FALSE MATERIAL STATEMENTS.

In support of these Counts, the government introduced the 1978 Financial Statement for the project and two checks drawn on the Shamrock Gardens account payable to the order of Accent, Ltd., for carpet in the total amount of $650.00. These checks were signed by George Norris. The Government called as a witness, Betty Buzzy, the bookkeeper and secretary for Accent, Ltd., who testified that she received these checks in payment for the carpet from Norris. It was established by the Government that the Financial Statement which showed expenses of approximately $297,000.00 contained as part of these expenses the $650.00 for carpet.

This constituted the sum total of the Government's evidence to establish the conspiracy and the making of false material statements.

On cross-examination, Betty Buzzy testified that she did not know Barry Silver, that she had no dealings whatsoever with Barry Silver and that he had nothing at all to do with the purchase of the carpet from her company.

Deborah Curan, Norris' former bookkeeper at the time the checks were issued, testified that Mr. Silver had nothing to do with the issuance of these two checks.

The defendant, Silver, testified that there was nothing unusual about the purchase of carpet in the ordinary course of the management business as they were required to replace carpet from time to time. Silver went on to say that he had nothing to do with the purchase of this

particular carpet and was not aware of the purchase at the time the carpet was acquired. Silver explained that a bookkeeper picked up the entry from the check stub and put it on one of the monthly statements, and eventually it ended up as an expense item on the work papers which were turned over to the accountants for the preparation of the Financial Statement. Silver specifically denied that he had any agreement or understanding with Norris regarding the carpet or that he had somehow conspired to conceal this on the Financial Statement.

Norris testified that he did not submit the Financial Statement to HUD. He explained that he had stepped down as the Managing General Partner and that this position was assumed by Thomas Fennell. The Financial Statement is, in fact, signed by H. Thomas Fennell and the letter forwarding the same to HUD is over

Mr. Fennell's signature.

During the cross-examination of government witness, Andrew C. Epps, Deputy Manager for the HUD office in Richmond, Virginia, Epps explained that HUD requires the filing of the yearly financial statements in order to make decisions on rent increases requested by the mortgagor and in general, to assure themselves that the project is financially sound.

When counsel questioned Epps regarding the materiality of a discrepancy or error in the amount of $1,000.00 the following transpired:

Q "Well, first of all, just to answer that question, would a thousand dollars one way or the other make any difference in any of those decisions that you explained to us that you make in a total figure of two hundred and ninety-seven thousand?

A I would think that a thousand dollars would not." (Tr. 210)

The law is clear that the gist or gravamen of the offense of conspiracy is the making of an agreement to commit a crime. United States v. Borelli, 336 F.2d 376 (1964). In the instant case, there was absolutely no evidence of any agreement between the defendants, Norris and Silver, to violate §1001 and 1002 as charged in the Indictment.

While the determination of the issue of materiality of an alleged false statement is to be made by the Court, in the instant case the Court erred in determining as a matter of law that the false statement as alleged in Count II constituted a material fact. The law is clear that the test for determining the materiality of a false statement is:

> ". . . whether the falsification is calculated to induce action or reliance by an agency of the United States, - is it one that could affect or influence the exercise of governmental functions, - does it have a natural tendency to influence

or is it capable of influencing agency decisions?" U.S. v. East, 416 F.2d 351, 353 (9th Cir. 1969); quoted in U.S. v. Tarkington, 589 F.2d 415 at 416 (9th Cir. 1978); U.S. v. Deep, 497 F.2d 1316 at 1321 (9th Cir. 1974); U.S. v. Valdez, 594 F.2d 725 at 728 (4th Cir. 1979).

While it is true that it is not necessary to set forth in the Indictment all the circumtances which will render the false statement material to the matter in issue, Markham v. United States, 160 U.S. 319, 16 S.Ct. 288, 40 L.E. 441 (1895), the government must nevertheless establish the element of materiality at trial. Further, the government must show that the statement had the capacity to influence the determination required to be made. United States v. Beer, 518 F.2d 168, 172 (5th Cir. 1975). As the Court stated in Beer, supra, "In weighing the materiality of a false statement . . . we are constrained to require a reasonable showing of the potential effects of

the statement. If the functioning of a department or agency would not have been materially effected had it relied upon the statement, then the statement must necessarily be immaterial." Beer, supra, 518 F.2d at 172.

In the instant case there was no evidence to support a finding that the financial statement and supporting schedules and data had any influence or effect on the exercise of HUD's decision making processes, nor was there any evidence that it materially affected the functioning of HUD. It is further the contention of the defendants that as a matter of law and as a matter of fact, as testified by Epps, a $650.00 discrepancy in a financial statement comprised of expenses totaling $297,104.00 is not material.

It is further the contention of the defendants that Norris did not make or cause to be made a false representa-

tion. Norris did not sign the financial statement nor did he have anything to do with its preparation. The fact that he signed two checks is too remote to establish the violation of this statute.

It is therefore respectfully submitted by defendants that they have been denied due process of law.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that the Petition for Writ of Certiorari to this Honorable Court should be granted.

Respectfully submitted,

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APPENDIX

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 83-5277(L)

UNITED STATES OF AMERICA,

Appellee,

versus

GEORGE C. NORRIS, SR.,

Appellant.

No. 83-5278

UNITED STATES OF AMERICA,

Appellee,

versus

BARRY SILVER,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CR 83-88-N)

Argued: October 5, 1984

Decided: December 5, 1984

Before WIDENER and CHAPMAN, Circuit Judges and HARGROVE, United States District Judge for the District of Maryland, sitting by designation.

Stanley E. Sacks (Sacks, Sacks and Larkin on brief) and William L. Perkins, III (Price and Perkins on brief) for Appellants; Raymond A. Jackson, Assistant United States Attorney (Elsie L. Munsell, United States Attorney on brief) for Appellee.

CHAPMAN, Circuit Judge;

Appellants George C. Norris, Sr. and Barry Silver appeal their convictions under 12 U.S.C. § 1715z-4(b)(2) for a number of substantive counts and under 18 U.S.C. § 371 for conspiracy to use, willfully and knowingly, in violation of 12 U.S.C. § 1715z-4(b)(2), the proceeds from rents and other funds derived from a federally insured housing project, while its mortgage was in default, for purposes other than to meet the actual and necessary expenses arising in connection with the project. Norris is also appealing from his conviction under 18 U.S.C. § 1001 for making false material statements. This appeal challenges the

constitutionality of 12 U.S.C. § 1715z-4 (b)(2) and raises numerous other claims of error. Finding the challenged statute to be constitutional and the other exceptions to be without merit, we affirm.

I

Defendant Norris has been in the real estate business in the Tidewater section of Virginia for more than twenty years and has various business interests. In 1974 Norris, another general partner, and nineteen limited partners started Shamrock Gardens, a 74 unit apartment complex in Chesapeake, Virginia. Norris' other business interests included part ownership in several other federally financed housing projects. His sole proprietorship, the Norris Realty Company, managed these projects. Defendant Silver was comptroller of nineteen business entities in which defendant Norris had some ownership or proprietary interest, including Shamrock Gardens.

Prior to the construction of Shamrock Gardens, Norris signed had some ownership or proprietary interest, including Shamrock Gardens.

Prior to the construction of Shamrock Gardens, Norris signed, as managing general partner, a regulatory agreement with the Department of Housing and Urban Development (HUD). This agreement provided for the operation of the project and contained clauses controlling the distribution of proceeds from rents and funds during a period of default. Shamrock Gardens was covered by a $1,353,200 federally insured mortgage to the Federal National Mortgage Association. On May 28, 1976 the mortgage holder declared the mortgage in default and requested relief from the Secretary of HUD. Thereafter the mortgage was assigned to the Secretary of HUD and the original mortgage holder was paid the balance due

under the mortgage. After default HUD commenced negotiations with the defendants in an effort to arrange some type of payment on the indebtness. Meetings between officials of HUD and the defendants continued for a number of months and early in these discussions HUD advised the defendants that during the period of default they could make no disbursements from the Shamrock Gardens funds for purposes other than for the necessary operating expenses of Shamrock Gardens. The bookkeeper for Shamrock Gardens was employed by Norris Realty Company, and Norris and Silver advised him never to make a disbursement from the Shamrock Gardens checking account, while the loan was in default, without the consent of either Norris or Silver. Throughout the remainder of 1976 and through all of 1977, 1978 and a portion of 1979 HUD officials

attempted to negotiate with Norris a plan of repayment. The mortgage remained in default, and during this period, various amounts were disbursed from the Shamrock Gardens funds for purposes other than the necessary and operating expenses of Shamrock Gardens. Many of these disbursements were either for the personal benefit of Norris or for the benefit of other real estate entities in which he had a substantial interest. During this time Shamrock Gardens failed to submit to HUD as scheduled the required audited financial reports on Shamrock Gardens. An audited financial statement of Shamrock Gardens' financial condition was required to be filed within sixty days of the close of each fiscal year. On the form Shamrock Gardens submitted for fiscal year 1978, two items were shown as maintenance expenses

and decorating supplies which were for carpeting in Norris' personal residence and in a townhouse not a part of Shamrock Gardens. The defendants were managing other federally insured projects, they were familiar with the regulations, and they never expressed any lack of understanding of what they were required to do in the filing of various monthly and annual reports. When HUD finally took over the Shamrock Gardens project, it was over $400,000 in arrears.

II

Appellants challenge the constitutionality of 12 U.S.C.§ 1715z-4(b)(2) by claiming that it constitutes an impermissable delegation and abdication of legislative authority because it delegates to the Secretary of HUD the power to make laws by passing regulations the violation of which may be the subject of criminal prosecution.

Section 1715z-4(b) provides:

> Whoever, as an owner of a property which is security for a mortgage described in subsection (a) of this section, or as a stockholder of a corporation owning such property, or as a beneficial owner under any business organization or trust owning such property, or as an officer, director, or agent of any such owner, (1) willfully uses or authorizes the use of any part of the rents or other funds derived from the property covered by such mortgage in violation of a regulation prescribed by the Secretary under subsection (a) of this section, or (2) is such mortgage is determined, as provided in subsection (a) of this section, to be exempt from the requirement of any such regulation or is not otherwise covered by such regulation, willfully and knowingly uses or authorized the use, while such mortgage is in default, of any part of the rents or other funds derived from the property covered by such mortgage for any purpose other than to meet the actual

> and necessary expenses arising in connection with such property (including amortization charges under the mortgage), shall be fined not more than $5,000 or imprisoned not more than three years, or both.

The language and intent of the statute are clear and need no interpretation from HUD. The congressional intent is to prevent money of federally insured housing projects from being diverted to purposes other than actual and necessary expenses when the mortgage is in default. Congress enacted 12 U.S.C. § 1715z-4 in an effort to stop the diversion of funds from other than "actual and necessary expenses arising in connection with such property." Section 4(a) addresses insured mortgages and § 4 (b) covers conversion of rents during default in cases "exempt from the requirement of any such regulation or is not otherwise covered by such regulation."

The proscribed activity is clear because it applies to owners of property under mortgage who willfully and knowingly use any part of the rents or funds derived from the property for any purpose other than to meet the actual and necessary expenses, while the mortgage is in default. There is no need for HUD regulations to describe what is unlawful. The statute clearly states that if the loan is in default one may not use rent for any purpose other than meeting the actual and necessary expenses. This is the activity charged against the two defendants in fifteen of the counts in the indictment. The language is not ambiguous, and the intent is obvious to persons such as defendants who were involved with many federally insured projects.

Criminal statutes should be given their fair meaning in accord with the

evident intent of Congress. United States v. Rothberg, 480 F.2d 534 (2d Cir. 1973), cert. denied, 414 U.S. 856 (1973). Congressional intent is quite obvious under any reading of 12 U.S.C. §1715z-4(b)(2). The statute is intended to prevent the skimming of funds while the mortgage is in default.

Appellants argue that counts 3 through 17 of the indictment do not allege an offense because the Shamrock Gardens mortgage was not insured at the time of the alleged offenses in that it has been reassigned to HUD by the original mortgage. The language of Title 12 U.S.C. §1715z-4(b)(2), clearly indicates that it is applicable to mortgages that are not insured or no longer insured. That section states that it covers mortgages "exempt from the requirement of any such regulation or . . . not otherwise by such regulation."

The requirements of the statute are clear and unambiguous. The proscribed acts

are obvious to anyone of normal intelligence. The appellants were experienced in dealing with federally insured housing projects and the meaning and intent of the statute would be immediately apparent to them.

III

Appellants contend that the evidence was insufficient to convict them of conspiracy. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support the finding of guilt. United States v. Sherman, 421 F.2d 198 (4th Cir. 1970), cert denied, 398 U.S. 914 (1970). Although there was no direct evidence of an agreement between the defendants to violate the law, the circumstantial evidence is overwhelming. The existence of a conspiracy need not be proved by direct evidence, but may be inferred from the facts and circumstances

of the case, Iannelli v. United States, 420 U.S. 770 (1975). HUD advised defendants, orally and in writing, not to spend the rental income for any purpose other than to meet the actual and necessary expenses of the project while the loan was in default. During a period of three years the defendant continually used Shamrock Gardens funds for a multitude of purposes unrelated to Shamrock Gardens. These expenditures ranged from as little as $300 to as much as $10,000 and covered surveying costs, attorney's fees, carpeting, payments or personal loans of defendant Norris, feasibility studies of real estate, purchase of trucks, loans to other Norris entities, loans to individuals with whom Norris was doing business, deposits to banks to collateralize personal loans to Norris, down payments for options on real estate and even payments

of taxes due IRS by Norris Construction Company. Norris and Silver had instructed the Norris Realty Company bookkeeper to make no payments to HUD after the loan went into default as well as to make no payments or advances out of the Shamrock Gardens account without their permission.

This was ample evidence that there was an agreement between the defendants to do something forbidden by law, that the defendants were both knowing and willing members of the conspiracy; and that each committed overt acts in furtherance of its purpose. These are essential elements needed to support a conspiracy conviction, United States v. Falcone, 311 U.S. 205 (1940), and knowledge and participation may also be proved by circumstantial evidence. Glasser v. United States, 315 U.S. 60 (1942).

IV

In Count II of the indictment, George C. Norris, Sr. is charged with making false, fictitious and fraudulent statement as to a material fact in a matter within the jurisdiction of HUD in violation of 18 U.S.C. § 1001. Violation of this statute was also charged as one of the purposes of the conspiracy in Count I. The indictment charges that the false material statement submitted to HUD was the financial statement of Shamrock Gardens for 1978 which claimed that $35,584.00 was expended for maintenance of the project when Norris knew that this figure included the purchase of carpet for his personal residence and for the residence of a friend. Appellants do not contest the fact that Shamrock Gardens spent $650 for the carpet and that this carpet was used in the residence of Norris and in the residence of his friend.

Their point is that the amount of $650 is not material when it is considered as a part of the entire financial statement and that there was no evidence that this misstatement influenced or effected HUD's decisionmaking processes.

There is no requirement that the false statement influence or effect the decision making process of a department of the United States Government. The essential elements required to be proved under an 18 U.S.C. §1001 count are;

1. Making and using or causing the making and using of a false writing or document as to a material fact in relation to a matter within the jurisdiction of a department of the United States.

2. Doing the act knowing at the time that the writing or document was false, fictitious or fraudulent, and

3. Doing the act knowingly and willfully.. United States v. Seay, 718 F.2d 1279 (4th Cir. 1983), cert. denied _____U.S._____(1984).

Materiality is a question of law to be determined by the trial judge, United States v. Baker, 626 F.2d 512, 514, n.4 (5th Cir. 1980), and influencing or affecting the department decisionmaking process is an element to be considered in making this determination. The test of materiality is whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action. United States v. Diaz, 690 U.S. 1352 (11th Cir. 1982).

The false statement in this case meets the above test. Here, HUD had been nursing along Shamrock Gardens since its construction. HUD officials had been negotiating with defendants in an effort

to arrange a plan for the project to make payments on the note and mortgage. If HUD had known that project funds were being used to purchase carpeting for Norris' personal use at a time when he would not agree to make mortgage payments, such information would have a tendency to influence HUD's position in the continuing negotiations.

Under these facts it is not the size of payments but it is the act of making a false statement about the payments that is material. A true statement could have put HUD on notice and caused it to investigate the affairs of Shamrock Gardens and in the process, uncover other past improper expenditures and prevent future improper payments.

V

The trial judge imposed unusual sentences. He used split sentences under 18 U.S.C. §3651 but provided that the various sentences run consecutively.

Norris received sentences suspended upon the service of 70 days as to each and Silver's sentences were suspended upon the service of 60 days as to each count, but all sentences were consecutive. There is nothing in the language of 18 U.S.C. §3651 that prohibits consecutive sentences. The total time of the consecutive split sentences is considerably less than the defendants could have received upon conviction on any one of the counts of the indictment.

A trial judge is vested with broad discretion in sentencing. If the sentence is within the statutory limits it will not be reviewed in the absense of extraordinary circumstances. United States v. Wilson, 450 F.2d 495 (4th Cir. 1971).

Consecutive sentences may be imposed after convictions of conspiracy and the underlying substantive offenses.

Iannelli v. United States, 420 U.S. 770 (1974). Use of consecutive sentences is discretionary, United States v. Wylie, 625 F.2d 1371 (9th Cir. 1970), cert. denied, 449 U.S. 1080 (1980). The fact that defendants may have been eligible for parole earlier than under some other form of sentence does not invalidate these sentences.

VI

The defendants claim error because the district court refused to quash a grand jury subpoena of records of Shamrock Gardens which were maintained by Norris Realty Company, the sole proprietorship of defendant Norris, and refused to suppress at trial the records obtained under the subpoena because of the alleged government misconduct in examining certain records while they were under seal.

Norris contends that the records of Norris Realty Company were his personal records and further contends that the partners of Shamrock Gardens had no control over the records or access to them, so that they remained the personal property of Norris. Norris seeks support in Bellis v. United States, 417 U.S. 85 (1974), contending that Shamrock Gardens does not qualify as the "collective entity." His reliance on Bellis is misplaced. Norris Realty Company maintained the records of Shamrock Gardens for the partnership which owned the project. Norris Realty maintained the books showing the income and expenditures of the project, and it also kept possession of the checkbooks and bank statements and wrote all checks for Shamrock Gardens. Norris Realty also filed all tax returns and prepared HUD reports. Under the law, any partner

would have the right to examine all of these records. They were not confidential as among the partners, nor were they personal as to Norris. Norris Realty maintained the records on numerous real estate ventures and Mr. Norris may not shield all of these records by claiming that they are personal. Bellis does not protect subpoenaed records held by one in a representative capacity when it is fair to say that the records are the records of an organization and not of an individual. Bellis, 417 U.S. at 93. Here Norris Realty was keeping the records in its representative capacity as the bookkeeper for the partnership, and the records are those of the partnership itself and not of one of the individual partners.

When these records were subpoenaed the court ordered them sealed and ordered the attorneys for the government and

and defendant Norris to review the records and attempt to agree on the records that were personal to Norris, the records that might relate to other business enterprises, and the records that related solely to Shamrock Gardens. The attorneys failed to agree as to a number of the records and the assistant United States attorney directed an FBI agent to examine the records to obtain the account numbers and bank custodians so this information could be used at the subsequent hearing on the motion to quash. The FBI agent examined the records that were under seal. The trial court criticized government counsel for violating the sealed order, but the court concluded that the records "were the life blood of the partnership" and that Norris brought about the confrontation because he failed to agree as to records that were obviously reachable by subpoena. Although the action of Norris in attempting

to shield these records does not justify the action of the assistant United States attorney or the FBI agent in reviewing the records under seal, the agent did little more than identify the various bank records, so they could be referred to at the hearing before the district judge. At this hearing the trial court found that all of these records were subject to subpoena, and they were admitted in evidence at the trial. Norris has stated no reason, nor has he produced any authority to support his claim that the bank records should have been suppressed and not used at the trial. He urges that the court use its supervisory power to discourage prosecutors from violating orders sealing records. In Lopez v. United States, 373 U.S. 427, 440 (1963), the court held that the supervisory power to refuse to receive material evidence should be sparingly exercised. At the

hearing on the motion to suppress, the trial judge held that neither the attorney for the government nor the attorneys for the defendant had complied with the prior order of the court as to the examination of these records and he directed that they do so immediately. These discovery type problems are best left to the discretion of the trial judge, and there has been no showing of abuse of discretion.

VII

There is no merit to the claim that the trial judge improperly i terjected himself into the case by asking questions of certain witnesses. A trial judge is entitled to ask questions pertinent to developing the facts in an effort to clarify. A trial judge is not an umpire but is a governor to see that justice is done. Pollard v. Fennell, 400 F.2d 421 (4th Cir. 1968). "He may intercede because

of apparent inadequacy of examination or cross-examination by counsel, or to draw more information from relevant witnesses or experts who are inarticulate or less than candid." Crandell v. United States, 703 F.2d 74, 78 (4th Cir. 1983). On the present record it is obvious that the trial judge sought to clarify and in doing so he did not prejudice the defendants.

The remaining exceptions are without merit.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

UNITED STATES OF AMERICA

v. Criminal Action
No. 83-88-NN

GEORGE C. NORRIS, SR.
and
BARRY SILVER

MEMORANDUM ORDER

This matter is before the Court on the defendants' Motions for a New Trial, In Arrest of Judgment and for Judgment of Acquittal. The Court, at the defendants' request, held an evidentiary hearing on November 3, 1983.

Background

On May 9, 1983, the Grand Jury returned an indictment against the defendants, George C. Norris, Sr. and Barry Silver. On July 25, 1983, the Grand Jury returned a superseding indictment against the defendants. Count 1 of the superseding indictment alleged a conspiracy

between the defendants to: (1) willfully and knowingly use and authorize the use, while the mortgage was in default, of part of the rents or other funds derived from Shamrock Gardens, a federally insured housing project, for purposes other than tomeet actual and necessary expenses, in violation of 12 U.S.C. § 1715z-4(b)(2); and (2) make false material statements in matters within the jurisdiction of the Department of Housing and Urban Development (HUD), in violation of 18 U.S.C. § 1001-1002. In Count 2 of the superseding indictment Norris was charged with causing a false statement to be made to HUD in a Shamrock Gardens financial statement, in violation of 18 U.S.C. §1001-1002. In Counts 3-17 Norris was charged with specific instances of uses of the rents or other funds derived from Shamrock Gardens, while the mortgage was in default, for purposes other than to meet the actual

and necessary expenses of the housing project, in violation of 12 U.S.C. § 1715z-4 (b)(2) and 18 U.S.C. §2. Silver was also charged in Counts 8, 10, 13, 14 and 15. On October 7, 1983, the jury found the defendants guilty on all counts in which they were charged.

MOTIONS IN ARREST OF JUDGMENT

Identical grounds have been asserted by both defendants in support of their Motions in Arrest of Judgment pursuant to Rule 34 of the Federal Rules of Criminal Procedure. The defendants allege that the superseding indictment does not state facts sufficient to constitute an offense against the United States. Specifically, the defendants assert that 12 U.S.C. §1715z-4(b)(2), one of the statutes under which the defendants were indicted, is inapplicable to the facts of the case, and further, that the statute is so vague that the defendants cannot be held to have willfully violated it. The defen-

dants previously asserted this position in their pretrial Motions to Dismiss the Indictment for Failure to Properly Charge an Offense.

The Court held, in ruling on the pretrial Motions to Dismiss the Indictment, that 12 U.S.C. § 1715z-4(b)(2) is applicable to the facts of the defendants' case. The Court held that the defendants were properly charged under subsection (b)(2) because the mortgage was previously insured by HUD and, despite its transfer to HUD following the default in 1976, it retained this status. Furthermore, the intent of Congress in providing for criminal penalties for the misuse of the funds and rents of multifamily housing projects insured by HUD while the mortgage is in default was to protect the Government's financial interests. See H.R. Rep. No. 1585, 90th Cong., 2nd Sess., reprinted in 1968 U.S. Code Cong. & Ad. News 2873, 2906. This legislative intent,

the Court ruled was equally applicable once the mortgage had been transferred to HUD. Any other interpretation would be illogical, because it would imply that Congress was no longer concerned about protecting the Government's financial interests once the mortgage had been transferred to HUD.

The defendants also argue in their motions that they cannot be convicted of violating 12 U.S.C. § 1715z-4(b)(2) because there is a conflict between HUD and the Department of Justice about the applicability of the statute. In support of their position the defendants cite United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974). They assert that Critzer stands for the proposition that a defendant cannot be found guilty of violating a criminal statute when two different departments of the Government differ as to its applicability. Critzer, however, has been narrowly construed

in later Fourth Circuit opinions. In United States v. Pomponio, 563 F.2d 659, 662 (4th Cir. 1977), the Fourth Circuit interpreted Critzer as holding that "when it is problematical as a matter of law whether a taxpayer's unreported income is taxable, mere errors in judgment will not give rise to criminal liability." This is a much narrower proposition than the one the defendants urge the Court to accept.

Furthermore, the evidence does not support the defendants' allegations that Government branches hold conflicting interpretations of the statute in question. At the evidentiary hearing on these motions, the defendants presented the testimony of Morton Baruch, who served as Deputy Assistant Secretary for Housing from February 1977 - February 1980. He testified that he was unaware of any written regulations or formal policies adopted by

HUD concerning the applicability of the criminal sanctions found in 12 U.S.C. § 1715z-4(b)(2) to HUD held mortgages. Mr. Baruch further testified that, while he was generally familiar with the statute, he never took any action with regard to it. He added that he was never called upon to implement the section in question during his employment with HUD. Although defendant Norris's counsel attempted to show through Mr. Baruch's testimony that the legal opinion of former HUD General Counsel Jane McGrew represented HUD policy on the applicability of § 1715z-4(b)(2), Mr. Baruch testified that he left HUD four to five months before the opinion was issued on June 10, 1980. Mr. Baruch further testified that after his departure from HUD he did not talk to any HUD officials about the formulation of any policy concerning the applicability of the statute, nor did he recall reading any such policy statement.

In addition, the defendants cannot plead ignorance as to the propriety of their disbursements. HUD officials, both orally and in writing, informed the defendants on numerous occasions that they were not to use the rents or other funds of Shamrock Gardens for purposes other than the actual and necessary expenses of the housing project.

The Court therefore FINDS that the superseding indictment is sufficient as a matter of law to charge the offenses of which the defendants were convicted. Accordingly, the Court DENIES the defendants' Motions in Arrest of Judgment.

MOTIONS FOR A NEW TRIAL

The defendants have filed Motions for a New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, alleging a variety of grounds for relief. The granting of a motion for a new trial is within the sound discretion of the trial

court. United States v. Wechsler, 406 F.2d 1032, 1033 (4th Cir.) (per curiam), cert. denied, 395 U.S. 978 (1969).

Both defendants challenge the sufficiency of the evidence as to Count 1 of the superseding indictment. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. 60, 80 (1942); see United States v. Grow, 394 F.2d 182, 201 (4th Cir.), cert. denied, 393 U.S. 840 (1968).

The defendants contend that the Government failed to prove that there was a conspiracy between the two defendants, because there was no evidence of agreement between the defendants to commit a criminal offense. Participation in a criminal conspiracy may be inferred from the circumstances. See Glasser v. United States, 315 U.S. at 80. The jury could properly infer from the testimony

of the witnesses, and from the documentary evidence, that the defendants conspired to commit the offense charged in Count 1 of the superseding indictment.

For example, there was testimony that the defendants engaged in negotiations with HUD officials in an effort to cure the mortgage default. There was also testimony that both defendants met, corresponded, and had telephone conversations with HUD officials, in which they were warned repeatedly that while the mortgage was in default the rents and other funds of Shamrock Gardens could be used only to meet the actual and necessary expenses of the housing project. Furthermore, there was testimony that despite the warnings of HUD officials the defendants continued to unlawfully use the rents and funds of Shamrock Gardens for the personal use of Norris and for other purposes not necessary to the operation of the housing

project. The documentary evidence, including a series of checks and checkbook stubs, corroborated the testimony of the witnesses.

The defendant Silver was the comptroller of various enterprises of which the defendant Norris was the principal. As such, comptroller Silver drew some of the checks for the questioned payments and, because he was in charge of the Shamrock Gardens checkbooks and other financial records, he had notice of and acquiesced in the other questioned payments made by Norris. Additionally, Silver prepared and submitted to HUD financial reports which included the questioned payments and in which those payments were treated as expenses of Shamrock Gardens which did not violate the law. From this and other evidence the jury could properly find that the defendants conspired to willfully and knowingly use

and authorize the use of the rents or other funds of Shamrock Gardens for purposes other than to meet the actual and necessary expenses of the housing project while the mortgage was in default, in violation of 12 U.S.C. §1715z-4((b)(2).

With regard to the conspiracy to make or cause to be made false statements to HUD, charged in Count 1 of the superseding indictment, the jury heard testimony that Norris caused to be issued two checks totalling $650.00 from the account of Shamrock Gardens for the purchase of carpet for his personal residence and for the residence of a friend. The evidence further revealed that Silver included these expenditures as maintenance and decorating expenses of Shamrock Gardens in the financial records used by the accounting firm hired to prepare the financial statement for HUD. From this

and other testimony, as well as from the documentary evidence, the jury could properly find that the defendants conspired to make or cause to be made false statements to HUD, in violation of 18 U.S.C. §§1001-1002. The Court therefore FINDS that there is substantial evidence to support the jury's verdict on Count 1.

Norris challenges the sufficiency of the evidence as to Counts 3-17, and Silver joins the challenging the sufficiency of the evidence as to Counts 8, 10, 13, 14 and 15. The defendants allege that the Government failed to prove that the funds expended were derived from the rents or other funds of Shamrock Gardens. The jury could reasonably conclude from the testimony of the Government's witnesses, such as Debbie Currans, the former bookkeeper for Norris's businesses, as well as from the documentary evidence, that

the rents or other funds of Shamrock Gardens were the source of the monies expended by Norris. It was within the province of the jury to determine the credibility of testimony by defense witnesses that the expenditures were made from funds owed by Shamrock Gardens to Norris in repayment for personal loans or for the performance of maintenance and management servcies. See United States v. Shipp, 409 F.2d 33, 36 (4th Cir.) (triers of fact determine credibility), cert. denied, 396 U.S. 864 (1969); White v. United States, 279 F.2d 740, 747 (4th Cir.)(for jury to determine credibility of witnesses and weight to be attached to their testimony), cert. denied, 364 U.S. 8[illegible] (1960). The Court therefore FINDS that there was sufficient evidence for the jury to find Norris guilty on Counts 3-17 and Silver guilty on Counts 8, 10, 13, 14 and 15.

The defendants also assert that the Court erred in charging the jury on Count 2 that the false statements made in the Shamrock Gardens financial statement received by HUD on April 9, 1979 were material. The Court instructed the jury that "the alleged facts, charged in the indictment as having been falsified, would be material facts." The defendants suggest that for a fact to be considered material the Government must prove that HUD officials actually relied upon or were influenced by the false statement. The Court held as a matter of law that the statute under which the defendants were charged, 18 U.S.C. §1001, does not require as an element of the criminal offense that Government officials actually rely upon the false statement.

In a prosecution under 18 U.S.C. §1001, the issue of the materiality of the false statement is a question of law

for determination by the Court. See United States v. Baker, 626 F.2d 512, 514 n.4 (5th Cir. 1980). The test used to determine materiality is whether the false statement has a natural tendency to influence or is capable of influencing agency action. See e.g., United States v. Diaz, 690 F.2d 1352, 1357 (11th Cir. 1982); United States v. Carrier, 654 F.2d 559, 561 (9th Cir. 1981); Tzantarmas v. United States, 402 F.2d 163, 168 (9th Cir. 1968), cert. denied, 394 U.S. 966 (1969); Gonzales v. United States, 286 F.2d 118, 122 (10th Cir. 1960), cert. denied, 365 U.S. 878 (1961).

Contrary to the position urged by the defendants, the Government does not have to show actual reliance on the facts contained in the false statement. See United States v. Diaz, 690 F.2d at 1357; Gonzales v. United States, 286 F.2d at 122.

Furthermore, the Government need not prove that the potential impact on the agency involved pecuniary loss. See United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907 (1980). "A statement can be material even if it is ignored or never read by the agency receiving the misstatement." United States v. Diaz, 690 F.2d at 1358; see United States v. McIntosh, 655 F.2d 80, 83 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982). The Government need prove only that the false statement has the "capacity to impair or pervert the functioning of the governmental agency." United States v. Lichenstein, 610 F.2d at 1278.

The Court's instruction that the facts included in the Shamrock Gardens financial statement received by HUD on April 9, 1979 were material is in accordance with the case law cited above. The

Court therefore FINDS that the jury was correctly instructed that the false statement included in the Shamrock Gardens financial report was material as a matter of law.

In his Motion for a New Trial, Norris alleges that there was insufficient evidence to support a conviction on Count 2 of the superseding indictment. In considering a motion for a new trial based on the ground of insufficient evidence the Court must sustain the jury verdict "if there is substantial evidence, taking the view most favorable to the Government, to support it." Glasser v. United States, 315 U.S. at 80.

The defendant Norris contends that the evidence established that he was no longer the managing General Partner of Shamrock Gardens at the time the financial statement containing the false information was filed, and that he

neither signed nor filed the statement with HUD. There was evidence, however, that when Norris drew the checks for the carpet from the account of Shamrock Gardens, knowing that it was not to be used in the housing project, he knew that this would cause the false information to be included in the financial records of Shamrock Gardens, which were maintained as required by HUD. It is well settled that the false statement need not be made directly to the federal agency in a prosecution under 18 U.S.C. §1001, as long as federal funds are involved. See, e.g., United States v. Baker, 626 F.2d 512, 514 (5th Cir. 1980). Viewing the evidence in the light most favorable to the Government, the Court FINDS that there is substantial evidence to support the jury verdict on Count 2.

Norris also challenges his conviction on Counts 3-17 of the superseding indict-

ment on the grounds that the facts in the indictment are insufficient to state an offense against the United States, and that the statute under which he was charged was vague and facially unconstitutional. The Court held, in ruling on the pretrial Motions to Dismiss the Indictment, that 12 U.S.C. §1715z-4(b)(2) was neither impermissibly vague nor unconstitutional on its face. The Court further held, for the reasons stated previously in this Memorandum Order in ruling on the Motions in Arrest of Judgment, that the defendant was properly charged in the indictment. Accordingly, the Court FINDS that a new trial is not warranted on these grounds.

In his Motion for a New Trial, Silver asserts that the Court erred in refusing to allow his attorney to question a Government witness, Fred Pfaender, on HUD's position on the applicability of

12 U.S.C. § 1715z-4(b)(2). The Court, in ruling on the defendants' Motions for Dismissal of the Superseding Indictment, held that 12 U.S.C. §1715z-4(b)(2) was applicable to the facts of this case. It is axiomatic that it is the function of the Court to determine the law which the jury should apply to the facts of a given case. Additionally, the admissibility of evidence is determined by the Court. Fed. R. Evid 104(a). Once the Court had determined that the statute was applicable, testimony concerning its applicability was not relevant and was properly excluded by the Court. See Fed. R. Evid. 402. Furthermore, during the course of the trial the Court stated that it would make Pfaender available post-trial so that Silver could preserve Pfaender's testimony for purposes of appeal. At the post-trial hearing, however, Silver did not elect to have Pfaender testify. When questioned

about Pfaender's not being present Mr. Sacks, counsel for the co-defendant, stated to the Court that he had talked to Pfaender and Pfaender stated that he had no knowledge concerning HUD's position on the applicability of 12 U.S.C. §1715z-4(b)(2). Accordingly, the Court FINDS that the Court's refusal to allow this line of questioning is not ground to support the grant of a new trial.

Silver also alleges that the Court erred in refusing to submit the jury defendants' profferred instructions W, X, Y and Z. It is well settled that the trial court need not give every instruction requested by a defendant. There is no reversible error in the trial court's refusal to give specific requested instructions so long as those given "at least includ[e] the substance of the requested instructions in language sufficiently precise to instruct the

jury in the defendants' theory of defense." United States v. Mitchell, 495 F.2d 285, 288 (4th Cir. 1974); see United States v. Kenny, 645 F.2d 1323, 1337 (9th Cir.), cert. denied, 452 U.S. 920 (1981); United States v. Bobo, 477 F.2d 974, 988 (4th Cir. 1973), cert. denied, 421 U.S. 909 (1975). The defendants' theory of the case was subsumed in the instructions actually given to the jury. The Court FINDS that the failure to give the four requested instructions to the jury is not a ground to support the grant of a new trial.

For the foregoing reasons, the Court DENIES the defendants' Motions for a New Trial.

MOTIONS FOR JUDGMENT OF ACQUITTAL

The defendants have renewed their Motions for Judgment of Acquittal raised at the close of the Government's case and at the close of all the evidence pursuant

to Rule 29 of the Federal Rules of Criminal Procedure. In ruling on a motion for a judgment of acquittal, the Court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt . . . ." Jackson v. Virginia, 443 U.S. 307, 319 (1979); see United States v. Shaver, 651 F.2d 236, 238 (4th Cir. 1981).

Defendant Norris bases his Motion for Judgment of Acquittal on grounds identical to those raised in his Motion for a New Trial. Applying the appropriate standard in considering Norris's allegations, the Court DENIES his Motion for Judgment of Acquittal for the same reasons the Court enunciated in denying his Motion for a New Trial.

In his Motion for Judgment of Acquittal defendant Silver raises three grounds

not raised in either his motion for a New Trial or his Motion in Arrest of Judgment. Although the defendant failed to conform with Local Rule 11(F) in failing to include in the brief accompanying his motions a statement of the facts and authorities supporting these grounds, the Court will address them based upon motions previously filed by the defendant.

First, Silver alleges that his due process rights were violated by a pre-indictment delay. The defendant alleges that the Government was aware of improper disbursements of Shamrock Gardens funds as early as February 3, 1977 and that the original indictment was not returned until May 9, 1983. The Court denied Silver's motion to dismiss the original indictment for pre-indictment delay following oral argument on July 19, 1983. The defendant renewed his motion following the return of the superseding indictment on

August 3, 1983. On September 21, 1983 the Court, following oral argument, denied Silver's motion to dismiss the superseding indictment for pre-indictment delay.

Silver alleges that he was prejudiced by the delay because: (1) two potential witnesses died in the interim; and (2) the Government was in possession of records material to the defense during that period. The Court hereby affirms its earlier rulings. A defendant is not deprived of his due process rights because he is prosecuted following investigative delay, "even if his defense might have been somewhat prejudiced by the lapse of time." United States v. Lovasco, 431 U.S. 783, 796 (1977). The Court FINDS that the delay in bringing the indictment was caused by the continuing investigation of the offenses committed by the defendant, and that the defendant's due process rights were not violated as a

result of this investigative delay

The defendant alleges that the Government was aware of improper disbursements of Shamrock Gardens funds as early as February February 3, 1977 and that the original indictment was not returned until May 9, 1983. The Court denied Silver's motion to dismiss the original indictment for pre-indictment delay following oral argument on July 19, 1983. The defendant renewed his motion following the return of the superseding indictment on August 3, 1983. On September 21, 1983 the Court, following oral argument, denied Silver's motion to dismiss the superseding indictment for pre-indictment delay.

Silver alleges that he was prejudiced by the delay because: (1) two potential witnesses died in the interim; and (2) the Government was in possession of records material to the defense during that period. The Court hereby affirms its earlier rulings

A defendant is not deprived of his due process rights because he is prosecuted following investigative delay, "even if his defense might have been somewhat prejudiced by the lapse of time." United States v. Lovasco, 431 U.S. 783, 796 (1977). The Court FINDS that the delay in bringing the indictment was caused by the continuing investigation of the offenses committed by the defendant, and that the defendant's due process rights were not violated as a result of this investigative delay.

Silver also alleges that the indictment constituted unwarranted and selective or discriminatory prosecution because there had been no previous prosecutions under 12 U.S.C. §1715z-4(b)(2). The Court denied the defendant's Motion to Dismiss the Superseding Indictment on this ground on September 21, 1983. The Court hereby affirms its earlier ruling. A defendant

seeking to prove selective prosecution carries the heavy burden of proving "invidious discrimination" based upon an "arbitrary classification." United States v. Barber, 668 F.2d 778, 782 (4th Cir.), cert. denied, 1-3 S. Ct. 66 (1982). The defendant has failed to produce any evidence that he was singled out for prosecution based upon considerations of race, religion, or the desire to prevent the exercise of his constitutional rights. See id.; see also Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Crowthers, 456 F.2d 1074, 1080 (4th Cir. 1972). Nor has he proven any bad faith on the part of the government in prosecuting him. The Court therefore FINDS that the defendant's allegation concerning selective prosecution is without merit.

In addition, Silver asserts that the indictment should have been dismissed because it was founded upon illegally

seized evidence. Specifically, he alleges that certain records obtained from his co-defendant pursuant to a subpoena duces tecum were illegally inspected by F.B.I. agents while under seal pursuant to a protective order. The Court denied the defendant's Motion to Suppress this evidence following oral argument on July 19, 1983. Even if the government did acquire the incriminating records in violation of the fifth amendment, the defendant would not be entitled to a dismissal of the indictment on this basis. See United States v. Blue, 384 U.S. 251, 255 (1966); Lawn v. United States, 355 U.S. 339, 349 (1958); Costello v. United States, 350 U.S. 359, 363 (1956). Accordingly, the Court FINDS that the defendant's allegation that the indictment should have been dismissed on this ground is without merit.

The remaining grounds contained in Silver's Motion for Judgment of Acquittal

are identical to those contained in his Motion for a New Trial. Applying the appropriate standard in considering Silver's remaining allegations, the Court FINDS, for the same reasons enunciated in ruling on the Motion for a New Trial, that they do not support the entry of judgment of acquittal. Accordingly, the Court DENIES defendant Silver's Motion for Judgment of Acquittal.

CONCLUSION

In accordance with the foregoing, the Court hereby DENIES the defendants' Motions for a New Trial, in Arrest of Judgment and for Judgment of Acquittal.

The Clerk is DIRECTED to send copies of this Order to all counsel of record.

J. Calvitt Clarke, Jr. /s/
United States District Judge

Norfolk, Virginia

November 4, 1983

§1715z-4. Modifications in terms of insured mortgages covering multifamily projects

Requests for extensions to cure defaults or for modifcation of mortgage terms; regulations

(a) The Secretary shall not consent to any request for an extension of the time for curing a default under any mortgage covering multifamily housing, as defined in the regulations of the Secretary, or for a modification of the terms of such mortgage, except in conformity with regulations prescribed by the Secretary in accordance with the provisions of this section. Such regulations shall require, as a condition to the granting of any such request, that, during the period of such extention or modification, any part of the rents or other funds derived by the mortgagor from the property covered by the mortgage which is not required to meet actual and necessary expenses aris-

ing in connection with the operation of such property, including amortization charges under the mortgage, be held in trust by the mortgagor and distributed only with the consent of the Secretary; except that the Secretary may provide for the granting of consent to any request for an extention of the time for curing a default under any mortgage covering multifamily housing, or for a modification of the terms of such mortgage, without regard to the foregoing requirement, in any case or class of cases in which an exemption from such requirement does not (as determined by the Secretary) jeopardize the interest of the United States.

Violations and penalties

(b) Whoever, as an owner of a property which is security for a mortgage described in subsection (a) of this section, or as a stockholder of a corpora-

tion owning such property, or as a beneficial owner under any business organization or trust owning such property, or as an officer, director, or agent of any such owner, (1) willfully uses or authorizes the use of any part of the rents or other funds derived from property covered by such mortgage in violation of a regulation prescribed by the Secretary under subsection (a) of this section, or (2) if such mortgage is determined, as provided in subsection (a) of this section, to be exempt from the requirement of any such regulation or is not otherwise covered by such regulation, willfully and knowingly uses or authorizes the use, while such mortgage is in default, of any part of the rents or other funds derived from the property covered by such mortgage for any purpose other than to meet actual and necessary expenses arising in connection with such property (including

amortization charges under the mortgage), shall be fined not more than $5,000 or imprisonment not more than three years, or both.

Superseding Indictment

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,

v.

GEORGE C. NORRIS, SR.
BARRY SILVER

CRIMINAL NO.
83-88-N
Filed July 25, 1983

July 1983 Term - at Richmond, Virginia

THE GRAND JURY CHARGES THAT:

A. Introduction

1. Shamrock Gardens is a 74-unit apartment project located at 1258 George Washington Highway, Chesapeake, Virginia, whose mortgage of $1,353,200 was initially insured by the Department of Housing and Urban Development (HUD) under the provisions of Section 221 of the National Housing Act. After default on the mortgage, the mortgage was assigned to HUD and held by HUD under the provisions of Section 207g of the National Housing Act. Shamrock Gardens, which was built in 1974 and 1975, was sponsored by Shamrock Gardens, Partnership,

whose principals include defendant, GEORGE C. NORRIS, SR., as managing general partner.

2. The defendant, GEORGE C. NORRIS, SR., and other principals were required to make monthly mortgage payments to the mortgage holder, Government National Mortgage Association. Because no payments were made on the mortgage, the mortgage holder declared the mortgage in default and requested relief from the Secretary of HUD. On May 28, 1976, the mortgage was assigned to Secretary of HUD. The defendants, GEORGE C. NORRIS, SR. and BARRY SILVER engaged in negotiations with HUD in an effort to cure the default.

B. Charging Paragraph

From on or about February 1977, and continuously thereafter up to and including April 18, 1979, in the Eastern District of Virginia and elsewhere, GEORGE C. NORRIS, SR. and BARRY SILVER, the defendants herein, unlawfully, knowingly, willfully and inten-

tionally did combine, conspire, confederate and agree together with each other and with diverse other persons whose names are to the Grand Jury unknown, (1) to willfully and knowingly use and authorize the use, while the aforesaid mortgage was in default, part of the rents or other funds derived from Shamrock Gardens for purposes other than to meet actual and necessary expenses arising in connection with Shamrock Gardens in violation of Title 12, United States Code, Section 1715z-4(b)2; and (2) to make false material statements in matters within the jurisdiction of the Department of Housing and Urban Development, an agency of the United States, in violation of Title 18, United States Code, Sections 1001 and 2.

C. Means and Methods of Conspiracy

1. It was a part of said conspiracy that the defendants, GEORGE C. NORRIS, SR. and BARRY SILVER, would and

did engage in regular and continuing meetings with the Department of Housing and Urban Develment officials for the represented purpose of curing the mortgage default of Shamrock Gardens through a negotiated workout agreement.

2. It was further a part of said conspiracy that on August 18, 1978, the defendant, GEORGE C. NORRIS, SR., executed and returned to HUD a signed workout agreement which required, in part, a $50,000 cash payment from the sponsor, Shamrock Gardens Partnership.

3. It was also a part of said conspiracy that during and after negotiations to reach a provisional workout agreement to cure the default, the defendants, GEORGE C. NORRIS, SR. and BARRY SILVER unlawfully used rents and funds derived from Shamrock Gardens for the personal use of the defendant, GEORGE C. NORRIS, SR., and for other purposes not necessary to the operation of Shamrock Gardens.

D. Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, GEORGE C. NORRIS, SR. and BARRY SILVER, the defendants herein, and unindicted co-conspirators committed and caused to be committed overt acts in the Eastern District of Virginia and elsewhere, including but not limited to the following:

1. On or about February 3, 1977, the defendant, BARRY SILVER, met with HUD officials to discuss improper disbursements of Shamrock Gardens funds.

2. On or about March 18, 1977, the defendant, GEORGE C. NORRIS, SR., submitted a reinstatement plan to HUD for Shamrock Gardens.

3. On or about August 19, 1977, in Norfolk, Virginia, the defendant, GEORGE C. NORRIS, SR., placed $10,000 of Shamrock Gardens funds in a savings account at Atlantic National Bank and pledged said

$10,000 as collateral for a personal loan which was later paid off with the collateral.

4. On or about March 8, 1978, the defendant, GEORGE C. NORRIS, SR., drew a check on the Shamrock Gardens checking account to purchase a $10,000 cashier's check which was used to purchase an option to buy Daniel Gardens apartments.

5. On or about March 23, 1978, the defendant, GEORGE C. NORRIS, SR., caused to be issued a $8,560.31 check on Shamrock Gardens account to purchase a cashier's check payable to the Internal Revenue Service for Norris Construction Company, a corporation in which defendant, GEORGE C. NORRIS, SR., has an interest.

6. On or about July 25, 1978, the defendant, GEORGE C. NORRIS, SR., caused to be issued a Shamrock Gardens check for $6,000.00

7. On or about May 15, 1978, the defendant, GEORGE C. NORRIS, SR., caused to

be issued a Shamrock Gardens check for $2,511.50.

8. On or about May 19, 1978, the defendant, GEORGE C. NORRIS, SR., caused to be issued a Shamrock Gardens check for $3,500.00.

9. On or about June 13, 1978, the defendant, GEORGE C. NORRIS, SR., caused to be issued a Shamrock Gardens check for $350.00 for carpeting for a townhouse.

10. On or about July 17, 1978, the defendant, GEORGE C. NORRIS, SR., caused to be issued a Shamrock Gardens check for $300.00 to purchase carpeting for his personal residence.

11. On or about August 18, 1978, the defendant, GEORGE C. NORRIS, SR., returned a signed provisional workout agreement to HUD without the required $50,000 payment

12. On or about October 21, 1978, the defendant, GEORGE C. NORRIS, SR.,

caused to be issued a $3,000 check on the Shamrock Gardens account.

13. On or about November 7, 1978, the defendant, BARRY SILVER, caused to be issued a $1,060.62 check on the Shamrock Gardens checking account.

14. On or about November 27, 1978, the defendant, BARRY SILVER, caused to be issued a $750.00 check on the Shamrock Gardens checking account.

15. On or about February 20, 1979, the defendant, BARRY SILVER, caused to be issued a $5,493.34 check on the Shamrock Gardens checking account.

16. On or about April 18, 1979, the defendant, GEORGE C. NORRIS, SR., caused to be issued a $10,002.00 check on the Shamrock Gardens checking account.

17. On or about December 8, 1978, the defendant, GEORGE C. NORRIS, SR., caused to be issued a Shamrock Gardens check for $3,781.00 which was used to buy

trucks that were titled to Norris Construction Company.

(All in violation of Title 18, United States Code, Section 371.)

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 6, 1979, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., willfully and knowingly did make and caused to be made false, fictitious and fraudulent statements and representations as to material facts in a matter within the jurisdiction of the Department of Housing and Urban Development (HUD), an agency of the United States, in that in a Shamrock Gardens financial statement for years ended December 31, 1978 and 1977, and attached supplemental schedules and supporting data that he had submitted to the said Department of Housing and Development, the defendant, GEORGE C. NORRIS, SR., caused

to be stated and represented that $35,584.00 were expended for maintenance expenses for Shamrock Gardens for year 1978, whereas in truth and fact, as he then knew, said $35,584.00 was false because it included expenses incurred for the purchase of carpet for his personal residence and a friend's residence.

(In violation of Title 18, United States Code, Sections 1001 and 2.)

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about July 25, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $6,000.00 of the

rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 11, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $3,200.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about August 14, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $7,502.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

On or about September 27, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $7,002.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about October 21, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $3,000.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 7, 1978, in the Eastern District of Virginia, the defendants, BARRY SILVER, as comptroller for

George C. Norris, Sr., and GEORGE C. NORRIS, SR., the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $1,060.62 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 14, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a

multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $8,002.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about November 27, 1978, in the Eastern District of Virginia, the defendants, BARRY SILVER, as comptroller for George C. Norris, Sr., and GEORGE C. NORRIS, SR., the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage

held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $750.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about December 8, 1978, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage

was in default, $3,781.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 5, 1979, in the Eastern District of Virginia, the defendant, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $2,502.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet

actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about January 15, 1979, in the Eastern District of Virginia, the defendants, BARRY SILVER, as comptroller for George C. Norris, Sr., and GEORGE C. NORRIS, SR., the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $750.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 16, 1979, in the Eastern District of Virginia, the defendants, BARRY SILVER, as comptroller for George C. Norris, Sr., and GEORGE C. NORRIS, SR., the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $700.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and

Title 18, United States Code, Section 2.)

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 20, 1979, in the Eastern District of Virginia, the defendants, BARRY SILVER, as comptroller for George C. Norris, Sr., and GEORGE C. NORRIS, SR., the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $5,493.34 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 28, 1979, in the Eastern District of Virginia, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $5,001.94 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 18, 1979, in the

Eastern District of Virginia, GEORGE C. NORRIS, SR., as the managing general partner of Shamrock Gardens, a multi-family housing project, which was security for a mortgage held by the United States Department of Housing and Urban Development, unlawfully, willfully and knowingly did use, while said mortgage was in default, $10,002.00 of the rent or other funds derived from Shamrock Gardens for a purpose other than to meet actual and necessary expenses arising in connection with Shamrock Gardens.

(In violation of Title 12, United States Code, Section 1715z-4(b)2, and Title 18, United States Code, Section 2.)

A TRUE BILL:

Janice E. Wimmie/S/
FOREMAN (deputy)

ELSIE L. MUNSELL
UNITED STATES ATTORNEY

By: Raymond A. Jackson/S/
Raymond A. Jackson
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Crim. Action
	:	No. 84-38-WKS
MARIO B. CAPANO and	:	
JOSEPH L. CAPANO,	:	
	:	
Defendants.	:	

Joseph J. Farnan, Jr., Esquire, United States Attorney, Richard G. Andrews, Esquire, Assistant United States Attorney, Wilmington, Delware, Attorneys for Plaintiff

L. Vincent Ramunno, Esquire, Ramunno & Ramunno, Wilmington, Delaware, Attorney for Defendants.

MEMORANDUM OPINION

Wilmington, Delaware

August 23, 1984

STAPLETON, Chief Judge:

The defendants in this criminal action have moved to dismiss the indictment charges which charges them with having violated subsection 1715z-4(b) of Title 12 of the United States Code. Section 1715z-4, in its entirety reads as follows:

> §1715z-4 Modification in terms of insured mortgages covering multifamily projects
>
> Requests for extensions to cure defaults or for modification of mortgage terms; regulations
>
> (a) The Secretary shall not consent to any request for an extension of the time for curing a default under any mortgage covering covering multifamily housing, as defined in the regulations of the Secretary, or for a modification of the terms of such mortgage, except in conformity with regulations prescribed by the Secretary in accordance with the provisions of this section. Such regulations shall require, as a condition to the granting of any such request, that, during the period of such extension or modification, any part of the rents or other funds derived by

by the mortgagor from the property covered by the mortgage which is not required to meet actual and necessary expenses arising connection with the operation of such property, including amortization charges under the mortgage, be held in trust by the mortgagor and distributed only with the consent of the Secretary; except that the Secretary may provide for the granting of consent to any request for an extension of the time for curing a default under any mortgage covering multifamily housing, or for a modification of the terms of such mortgage, without regard to the foregoing requirement, in any case or class of cases in which an exemption from such requirement does not (as determinded by the Secretary) jeopardize the interests of the United States.

Violations and penalties

(b) Whoever, as an owner of a property which is security for a mortgage described in subsection (a) of this section, or as a stockholder of a corporation owning such property, or as a beneficiary owner under any business organization or trust owning such property, or as an officer, director, or agent of any such owner, (1) willfully uses or authorized the use of any part of the rents or other funds derived from property covered by such mortgage in violation of a

> regulation prescribed by the Secretary under sub-- section (a) of this section, or (2) if such mortgage is determined, as provided in subsection (a) of this section, to be exempt from the requirement of any such regulation or is not otherwise covered by such regulation, willfully and knowingly uses or authorizes the use, while such mortgage is in default, of any part of the rents or other funds derived from the property covered by such mortgage for any purpose other than to meet actual and necessary expenses arising in connection with such property (including amortization charges under the mortgage), shall be fined not more than $5,000 or imprisoned not more than three years, or both.

For present purposes, I accept the government's contention that the Secretary's regulations define "multifamily housing" as accomodations designed principally for residential use, conforming to standards satisfactory to the Commissioner, and containing at least five rental dwelling units. See 24 C.F.R. § 207.24

The indictment in this case does not allege that the defendant had an interest in property secured by an FHA insured mortgage covering multifamily housing. The Grand Jury could not so allege because the mortgage referred to in the indictment was held by the Secretary at the relevant time as the mortgagee. This case thus presents the issue of whether Section 1715z-4(b) applies to situations in which the mortgage involved is other than an FHA insured one.

The government points out that, when read literally, the text of both subsections (a) and (b), as contrasted with the section title, is not limited to FHA insured mortgages. It is also true that subsection (b) literally applies to any mortgage on multifamily housing which "is not otherwise covered by" the regulations promulgated under subsection (a).

The defendants note that subsection (b), when read literally as suggested by the government, it not limited to mortgages in which the FHA has an interest and would thus cover every situation in which a privately held mortgage on multifamily housing is in default. They argue that Congress must have had some more limited scope in mind and maintains that the Congressional intent is clear from the title of Section 1715z-4 which refers to "insured mortgages covering multifamily projects." The defendants further assert, with considerable persuasive force, that the Secretary stands in a considerably different position when he is the insurer of a mortgage than when he is the mortgagee and that the need for the protection afforded by Section 1715z-4 is significantly greater in the former situation.

While the government argues to the contrary, it is apparent to me that the Secretary has read Section 1715z-4 to apply only to situations involving FHA insured mortgages. Under that Section, the Secretary cannot legally agree to an extention or modification unless and until he or she has promulgated regulations specifying the conditions he or she deems appropriate in such situations and including the condition mandated by the second sentence of subsection (a). As the government asknowledges, the Secretary has frequent occasion to renegotiate the terms of mortgages which have been assigned to him as well as to consent to extensions and modifications negotiated by private parties with respect to FHA insured mortgages. Yet the only regulation which the Secretary has adopted to implement Section 1715z-4 covers only the latter situation.

Thus, Section 207.256b of Part 24 of the Code of Federal Regulations, the only such implementing regulation, provides:

> (a) The mortgagor and the mortgagee may, with the appoval of the Commissioner, enter into an agreement which extends the time for curing a default under the mortgage or modifies the payment terms of mortgage.
>
> (b) The Commissioner's approval of the type of agreement specified in paragraph (a) of this section shall not be given unless the mortgagor agrees in writing that, during such period as payments to the mortgagee are less than the amounts required under the terms of the original mortgage, it will hold in trust for disposition as directed by the Commissioner all rents or other funds derived from the property which are not required to meet actual and necessary expenses arising in connection with the operation of such property including amortization charges under the mortgage.
>
> (c) The Commissioner may exempt a mortgagor from the requirement of paragraph (b) of this section in any case which the Commissioner determines that such exemption does not jeopardize the interests of the United States.

The limited scope of this implementing regulation compels the conclusion that the Secretary does not consider his authority with respect to mortgages held by him as mortgagee to be circumscribed by Section 1715z-4.

The Secretary's interpretation limiting the scope of Section 1715z-4 to government insured mortgages is supported by the scant legislative history. Commenting on the text that was to become Section 1715z-4, the House Report explains that:

> [T]he bill would add a new section 239 to the National Housing Act to require that any request for the extension of time for curing a default on an FHA-insured multifamily mortgage, or a modification of the terms of such a mortgage, be approved by the Secretary of HUD in accordance with regulations prescribed by him. During the period of modification or extension any rents or other funds (such as security deposits) derived from the mortgaged property in excess of that needed to meet operating expenses would be required to be held in trust by the mortgagor and

> distributed only with the consent of the Secretary.

H.R. Rep. No. 1585, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Ad. News 2873, 2906, 2995.

I conclude that this Court should defer to the Secretary's interpretation not only because he is the official responsible for the administration of the program and because his construction is supported by the legislative history, but also because this is a criminal case and the defendant should not be held accountable for arriving at a construction of the statute contrary to that inherent in the implementing regulations.

The defendants' motion must be granted for a further, independent reason, however. As evidenced by the text of the statute and the above-quoted legislative history, Section 1715z-4 is concerned with the conditions under which the Secretary will

consent to an extension or modification and with the protection which the government will have during the term of the extension or modification while there is an attempt to cure the default. While portions of subsection (b) can be read in isolation to apply in situations (apparently like the instant one) where there has been no extension or modification, that is a strained reading in the context of the section as a whole and its apparent purpose. In the absense of an administrative regulation giving notice of such an interpretation, I decline to apply it in a criminal case.

Since the indictment alleges neither that the mortgage involved was government insured nor that the defendants' conduct occurred in connection with an extension or modification of such a mortgage, it failes to allege a violation of Section 1715z-4. The defendants' motion to dismiss

the indictment will, accordingly, be granted.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Crim. Action
	:	No. 84-38-WKS
MARIO B. CAPANO and	:	
JOSEPH L. CAPANO,	:	
	:	
Defendants.	:	

ORDER

THIS 23rd day of August, 1984, for the reasons stated in the Court's Memorandum Opinion of this date,

IT IS ORDERED that defendants' motion to dismiss the indictment is granted.

Walter K. Stapleton /s/
United States District Judge

THE SECRETARY OF HOUSING
AND URBAN DEVELOPMENT
Washington, D.C. 20410

July 12, 1967

Honorable John Sparkman
Chairman
Committee on Banking and Currency
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Subject: S. 1249, 90th Congress
(Sen. McClellan)

This is in further reply to your request for the views of this Department on S. 1249, a bill "To amend the National Housing Act to further protect the interests of the United States in the insurances of certain mortgages."

This bill would add to the National Housing Act three new provisions relating to FHA insurance of mortgages on financing multifamily housing projects. The first section of the bill would require that approval by the FHA, of an

agreement modifying the terms of a mortgage for the purpose of curing a default, not be granted unless the mortgagor agrees to hold in trust and not distribute, without FHA approval, any project income remaining after payment of current operating expenses. In addition, this section would prohibit the use of project income by a mortgagor in default for any purpose other than meeting operating expenses. Violation of either provision by an official of the mortgagor entity would be a criminal offense with a maximum fine of $5,000 or imprisonment for not more then 3 years, or both, upon conviction.

Section 2 of the bill would require the FHA to obtain a cost certification from any contractor or subcontractor furnishing materials of services costing $100,000 or more in connection with the construction or rehabilitation of multi-

family housing which is financed with a mortgage insured by the FHA.

Section 3 of the bill would require the FHA to obtain an agreement, from the mortgagor of a multifamily project financed by a mortgage insured by the FHA, which would give the FHA and the Comptroller General access to any books, documents and records of the mortgagor for the purpose of examination and audit. Agreements for access to the books of a sponsor or any contractor or subcontractor furnishing services or materials would also be required.

The Department supports the objective of providing a criminal statute as a deterrent to the diversion of rental income from multifamily projects. We would defer, however, to the Department of Justice as to the constitutionality of criminal provisions, such as are contained in section 1 of the bill, which

leave the definition of the crime to the exercise of broad administrative discretion in the issuance of regulations.

FHA's present controls over project income are based solely upon civil enforcement of contractual arrangements. Under FHA procedures, all profit-motivated multifamily mortgagors are required, as a condition for insurance, to sign a regulatory agreement which provides that prior FHA approval is required for any distribution of assets or income except from "surplus cash". "Surplus cash" is described as cash remaining after the payment of all sums due or currently required to be paid under the terms of the mortgage, and after the deposit in escrow of funds for a reserve for replacements and after all tenant security deposits and other special funds have been segregated. Whenever a modification or forbearance agreement is approved, the

distribution of project income continues to be controlled by the regulatory agreement and supplementary contractual agreements. In the case of nonprofit mortgagor entities, similar regulatory agreements control the order of priority of use of income and the holding of residual receipts after the required uses of income are met.

The Department believes that sections 2 and 3 of the bill are not necessary in view of existing provisions of law which accomplish their purposes adequately.

The basic purpose of cost certification is to enable FHA to determine the true cost of a project so that the mortgage insured will not exceed the statutory maximum limits on the amount of a mortgage insured. Section 227 of the National Housing Act accomplishes this purpose. FHA presently requires cost certification from all contractors and subcontractors

who have an identity of interest with the mortgagor. This requirement is waived for subcontractors only if the total of identity of interest subcontracts is less that $10,000 or one-half of one percent of the mortgage amount, whichever is the greater, or when the Insuring Office is satisfied before the beginning of construction that the contract price is no greater than a favorable price obtainable in arms-length negotiation.

In addition, in the case of all non-profit mortgagors, the FHA requires cost-plus construction contracts, with an up-set price, in which the contractor agrees to certify costs to the FHA. Under these contracts, subcontractors who have an identity of interests with the contractor or mortgagor also certify costs. Cost certification requirements therefore apply to all FHA multifamily housing projects except where the mortgage finances

the construction of single family detached, semi-detached or row housing for sale to members or a nonprofit cooperative. Also, an accounting is required for kickbacks, rebates or trade discounts.

Basing the cost certification on the size of the contract or subcontract as provided in S. 1249 would create a reluctance on the part of many suppliers and subcontractors to bid on jobs where they may have no identity of interest with the sponsors, mortgagor or other contractors on a project. Large national firms supplying and installing such items as elevators, and heating and cooling plants would be particularly reluctant. They operate only on a lump sum basis. They would find that supplying cost figures for material or services an undue administrative burden, especially when the product installed would be one of their own manufacture. The cost figures

of a supplier with no identity of interest with either the general contractor or the mortgagor and operating under a lump sum contract, would not affect a mortgage amount based on the mortgagor's cost.

Most of the audit and record requirements of section 3 of the bill are already contained in section 814 of the Housing Act of 1954, and are being applied by FHA. FHA's regulatory agreements require the mortgagor to maintain books and records meeting standards prescribed by FHA and that the records and books be available for inspection. Cost-plus contract forms prescribed by FHA also provide for the keeping of records related to project construction and the right of inspection of the records of the contractor. We do not believe the requirements should be made applicable to contractors or subcontrac-

tors as provided by the bill, other than when considered administratively desirable as in cases of nonprofit mortgagors or when they have some identity of interest with the mortgagor.

The Bureau of the Budget has avised that there in no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

Robert C. Weaver

December 4, 1969

Mr. William D. Ruckalshaus
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Attention: Mr. Russell Chapin, Chief
General Claims Section

Re: Project No. 122-38018-CH
FIRST COMMUNITY CHURCH
Los Angeles, California
Your ref: 130-12-c-85

Dear Mr. Ruckelshaus:

This is in reply to Assistant United States Attorney Spivak's questions concerning Section 239 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1715z-4.

Please be advised that Section 207.-256b of FHA Regulations, 24 C.F.R. 207.256b, was promulgated by the Secretary to implement Section 239.

In our opinion, the legislative history and the language of Section 239

limit its applicability to mortgages insured by the Secretary, as distinguished from mortgages owned and held by the Secretary by reason of assignment from the original mortgages in exchange for insurance benefits. The term "insured mortgage" is used in the legislative history and in the title of the Section as it appears in the Housing and Urban Development Act. Moreover, the phrase "regulations of the Secretary," which appeared in Section 239(a), refers to the FHA Regulations which apply only to insured mortgages. Accordingly, there can be no violation of Section 239 after an insured mortgage has been assigned to the Secretary.

We agree with Mr. Spivak that the legislative history indicates that the criminal penalties under Section 239(b) apply only to willful diversions during

the period in which the time for curing the default has been extended or the mortgage is under modification. However, in 239(b)(2) the clause "or is not otherwise covered by such regulation" might be construed to cover any diversion under a project mortgage after default.

We have no opinion as to whether or not Mr. Hilyard could be prosecuted under Section 239(b) for his alleged defalcations while acting as the mortgagor's management agent. Such prosecution would depend on whether or not Mr. Hilyard could be construed as an "agent" of the owner within the meaning of 239(b). Such question has never been judicially determined.

Very truly yours,

John W. Kopecky
Acting Associate
General Counsel